United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1806

To be argued by
EVELYN J. JUNGE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EXXON CORPORATION,

Plaintiff-Appellant,

-against-

THE CITY OF NEW YORK; ENVIRONMENTAL PROTECTION ADMINISTRATION OF THE CITY OF NEW YORK; and ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION ADMINISTRATION OF THE CITY OF NEW YORK,

Defendants-Appellees.

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P/S

GETTY OIL CO. (Eastern Operations), INC.; GULF OIL CO.-U.S.; MOBIL OIL CORPORATION; and SUN OIL COMPANY OF PENNSYLVANIA,

Plaintiffs-Appellants,

-against-

THE CITY OF NEW YORK; HERBERT ELISH, Environmental Protection Administrator of the City of New York; and the ENVIRONMENTAL PROTECTION ADMINISTRATION OF THE CITY OF NEW YORK,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

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Preliminary Statement

This is an interlocutory appeal from Order of the United States District Court for the Southern District of New York (Stewart, J.), dated March 8,

1974, denying the motions of plaintiffs-appellants Exxon Corporation ("Exxon") and Getty Oil Co. (Eastern Operations), Inc., Gulf Oil Co.-U.S., Mobil Oil Corporation and Sun Oil Company of Pennsylvania (hereinafter referred to collectively as the "Getty plaintiffs") for summary judgment on the counts of their respective complaints which allege that the defendants the City of New York and certain of its officials ("the City") were preempted from enforcing the provisions of a local law which regulates the lead content, and as further alleged by the Getty plaintiffs, the volatility limits of gasoline sold in New York City. On April 15, 1974, Judge Stewart amended and supplemented that Order to add the language necessary for certification of an interlocutory appeal pursuant to 28 U.S.C. §1292(b). By Order dated May 28, 1974, this Court accepted the appeal (Feinberg, J., dissenting).

The present brief is filed pursuant to this Court's Order of November 22, 1976. It consolidates, updates and supersedes previous briefs filed by the City on September 18, 1974 and November 12, 1974.

Question Presented

Is there presently in effect a federal control applicable to the lead content of gasoline which would preempt the City of New York from enforcing those

portions of a local law, promulgated in the exercise of its police power, which regulate the lead content or volatility characteristics of gasoline sold in New York City?

Facts

(1)

On August 20, 1971 the Administrative Code of the City of New York ("Code") was amended by local law by the addition thereto of the Air Pollution Control Code (§§1403.2 et seq.), which, inter alia, sets specifications for the lead content and other physical characteristics of gasoline offered for sale in the City of New York.

Adding lead to gasoline is one method of preventing engine knocking. The lead content of gasoline, however, is regulated because automobile lead exhausts are known to present a hazard to health. Section 1403.2-13.11 of the Code ("City lead regulations") provides for a scheduled reduction in the lead content of gasoline sold in New York City. It is reproduced in the Appendix at pp. 127a-128a and in Appellants' Joint Brief in Addendum G. Specifically, the regulations provide that the maximum level of lead in gasoline sold in New York City should not exceed as of November 1, 1971, 2.0 grams per gallon for premium gasoline and 1.5 grams per gallon for regular gasoline. Thereafter the permissible lead content is reduced uniformly

for both grades of gasoline to 1.0 grams per gallon by January 1, 1972; 0.5 grams per gallon by January 1, 1973; and zero grams per gallon (defined in the statute as 0.075 grams or less per gallon) by January 1, 1974.

(2)

In 1970 the Congress amended the Clean Air Act, 42 U.S.C. §1857 et seq., so as to provide, inter alia, that the Administrator of the Federal Environmental Protection Agency ("federal Administrator") could by regulation control or prohibit the use of a fuel or fuel additive if he found that "any emission products of such fuel or fuel additive will endanger the public health or welfare" ("public health standard") or that the "emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system" either already in or likely to be in general use ("emission control device standard") (42 U.S.C. §1857f-6c(c)(1)).

The statute goes on to provide for federal preemption of local regulation of fuel and fuel additives only if the federal Administrator has "found that no control or prohibition ... is necessary and has published his finding in the Federal Register" or "if the [federal] Administrator has prescribed ... a control or prohibition applicable to such fuel or

fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the Administrator" (42 U.S.C. §1857f-6c (c)(4)(A)).

(3)

In late 1972 appellants sought a variance from the City's lead regulations, which regulations would have restricted them, as of January 1, 1973, from marketing gasoline with a lead content greater than 0.5 grams per gallon. The variances were granted in that the time for compliance with the City's lead regulations was extended until March 30, 1973, to supply conforming regular gasoline, and until June 28, 1973, to supply conforming premium gasoline.

On January 10, 1973, the federal Administrator promulgated an emission control device standard (as opposed to a public health standard) for the lead content of gasoline, as provided for in 42 U.S.C. §1857f-6c(c)(1)(B). That regulation required gasoline stations to provide at least one pump of lead-free gasoline after July 1, 1974. See Appellants' Joint Brief, Addendum A.

Appellant Exxon served its complaint herein on March 9, 1973. That complaint, which seeks declaratory and preliminary and permanent injunctive relief, alleges that the appellees (collectively "the City") seek to enforce the City's lead regulations in violation of the Supremacy and Commerce

Clauses of the Constitution of the United States. Specifically, Count I alleges that the City is preempted from enforcing its lead regulations by virtue of the aforementioned emission control device standard for lead in gasoline published by the federal Administrator on January 10, 1973. Count II of the Exxon complaint alleges that the City lead regulatons discriminate against and impose impermissible burdens upon interstate commerce (7a-24a).

On March 14, 1974, Getty plaintiffs served a complaint similarly alleging that the City's gasoline regulations were preempted and that the City's lead regulations imposed an impermissible burden on interstate commerce. However, Getty plaintiffs sought preliminary and permanent injunctive and declaratory relief not only as to the City's lead regulations, but also as to the City's volatility regulations (25a-49a).*

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*Gasoline volatility refers to ease of evaporation and is generally limited by removal of the butane-pentane (C_4 C_5) fraction which is then replaced by another hydrocarbon fraction (122a). The C_4 C_5 fraction is never replaced by lead and gasoline volatility is controlled in a manner unrelated to the lead content of gasoline (122a-123a). Volatility is regulated because it affects the amount of evaporated hydrocarbons emitted into the ambient air (122a). Among other deleterious effects of these ambient hydrocarbons is their combination with oxides of nitrogen or other oxidents to produce photochemical smog (id.).

The District Court denied appellants' motions for preliminary injunctive relief on March 22, 1973, but, upon appellants' applications, subsequently granted a stay of enforcement of the 0.5 grams per gallon requirement of the City's lead regulations pending appeal. Accordingly, appellants were thereupon free to continue to market gasoline in New York City with a lead content of not more than 1.0 grams per gallon. In its opinion, the District Court gave weight to the fact that the Clean Air Act distinguished between an emission control device standard and a public health standard. Finding that the City's lead regulations were health regulations and that the January 10, 1973 federal regulations concerned an emission control device standard, the Court concluded that in light of the distinction in the Clean Air Act, and because the purposes of the federal and City regulations were not identical, preemption had not yet occurred. Exxon Corporation v. City of New York, 356 F. Supp. 660 (S.D. N.Y. 1973).

Appellants thereupon moved for and were granted an expedited appeal to this Court. In a decision dated May 17, 1973, this Court did not reach the merits of the preemption issue, but remanded the cases to the District Court on the interstate commerce issue and continued the stay pending appeal on condition that the appellants be ready for trial within 30 days of the filing of the opinion. Exxon Corp. v. City of New York, 480

F. 2d 460 (2d Cir. 1973).

Because the parties expected imminent promulgation of further federal and/or state lead regulations which might render unnecessary a lengthy trial on the merits of the burden on interstate commerce issue, the trial was deferred until it could be determined when such further federal and/or state lead regulations would be promulgated. The stay of the District Court, as extended by this Court, continues in effect today. In compliance therewith, appellants are currently marketing gasoline in New York City with a lead content of not more than 1.0 grams per gallon.

(4)

On December 6, 1973, the acting federal Administrator published federal public health standards--as distinct from emission control device standards--for the lead content of gasoline. These regulations established prospective controls for the staged reduction of the lead content of gasoline from 1.7 grams per gallon after January 1, 1975 to 0.5 grams per gallon after January 1, 1979. Prior to January 1, 1975, no control was established. See Addendum B to Appellants' Joint Brief.

Appellants thereupon amended their respective complaints to include the December 6, 1973 federal public health standard regulations. On

January 24, 1973, Getty plaintiffs moved for summary judgment on Count One of their complaint alleging that federal regulations concerning public health standards for the lead content of gasoline had preempted the City lead and volatility regulations. The following day Exxon served a similar motion for summary judgment limited to the claim that the City's lead regulations were preempted.

In the decision appealed from herein the District Court on March 8, 1974, denied appellants' motions for summary judgment. The Court found that there was not then a federal health control and that the City was not preempted from enforcing its lead regulations until such time as the federal health controls became applicable (137a). The District Court further found that the federal lead regulations, unrelated as they were to volatility standards, did not preempt the City's volatility standards (138a).

(5)

While this litigation was proceeding, the public health standard regulations as promulgated on December 6, 1973 were challenged in the United States Court of Appeals for the District of Columbia Circuit. On December 20, 1974, which was subsequent to the submission of briefs herein, that Court set aside the federal public health regulations. As a consequence, the federal Administrator "suspended enforcement of

these regulations" (40 Fed. Reg. 7480, reproduced as Addendum C in Appellants' Joint Brief) and thereafter petitioned the Court for rehearing en banc. In granting the petition for rehearing, the Court vacated the prior judgment and opinions and, on March 19, 1976, issued a judgment upholding the federal public health standard regulations. Ethyl Corp. v. Environmental Protection Agency 541 F. 2d 1 (D.C. Cir. 1976). The Federal Administrator, however, continued the "suspension" of the lead reduction schedule published in the December 6, 1973 notice (which would have started as of January 1, 1975) pending preparation and disposition of a proposed petition for certiorari to the United States Supreme Court, which petition was denied on June 14, 1976 (96 S. Ct. 2663 (1976)).*

Thereafter, on July 9, 1976, the federal Administrator published a notice in the Federal Register stating that enforcement of the initial phase of the lead reduction schedule would take place on October 1, 1976 (41 Fed. Reg. 28352-53, reproduced as Addendum E to Appellants' Joint Brief). However, on September 28, 1976, two days before the initial federal health control (requiring a stepdown in the lead content of gasoline to no more than 1.4 grams per gallon)

*Oral argument herein was postponed pursuant to an Order of this Court dated March 19, 1976, pending final determination of the Ethyl litigation.

would have become applicable, a further notice was published in the Federal Register amending the regulations by removing the October 1, 1976 deadline. Specifically, that amendment "eliminates the interim phase down levels prior to January 1, 1978, but ... leaves in effect the 0.8 grams per gallon standard to begin January 1, 1978 ...." (Emphasis added) (41 Fed. Reg. 42676, reproduced in Appellants' Joint Brief as Addendum F). Additionally, the regulations impose certain reporting requirements on refineries prior to January, 1978.

Thus, although the complaints herein and the District Court's decision do not reflect developments since the federal public health regulations were initially vacated and thereafter reinstated by the Court of Appeals for the District of Columbia Circuit, this case stands in the same posture as it did two years ago when it was initially briefed; there is no presently enforceable federal public health standard for lead in gasoline and hence no applicable control which would preempt the City from enforcing its validly enacted public health regulations limiting the lead content and volatility characteristics of gasoline sold in New York City.

ARGUMENT

SUMMARY JUDGMENT WAS PROPERLY DENIED AS PREEMPTION HAS NOT YET OCCURRED.

We note at the outset that what is at issue here is not whether the City's lead and gasoline volatililty regulations can be preempted by applicable federal controls, but rather such preemption has taken place.

Appellants argue that the prescription of federal public health lead standards, imposing limits on lead in gasoline only as of a future date, is sufficient to preempt local lead regulations. The District Court properly rejected this argument, finding instead that preemption occurs only when there is an applicable federal lead control. The District Court's determination is consistent with the words of the statute, its legislative history and purposes, and the case law.

The facts are not in dispute. There are presently promulgated two types of federal regulations concerning the lead content of gasoline. The regulation first issued is an emission control device standard, promulgated pursuant to 42 U.S.C. §1857-6c(c)(1)(B). That regulation, which was published in the Federal Register on January 10, 1973, and became effective on February 9, 1973, did not provide a control applicable to gasoline until July 1, 1974, by which time it required generally that gasoline stations provide at

least one pump of lead free gasoline.* The second federal lead regulation sets a public health standard and was promulgated pursuant to 42 U.S.C. §1857f-6c(c)(1)(A). The public health standard regulation as most recently amended was published in the Federal Register on September 28, 1976, became effective immediately, but provides for no controls applicable to the lead content of gasoline until January 1, 1978, whereupon it will require a scheduled reduction in the lead content of gasoline commencing at the level of 0.8 grams per gallon. The City's lead regulations are health regulations and are more stringent than the federal regulations.

*Appellants' preemption argument is also based in part on the emission control device standard (Appellants' Joint Brief at pp. 31-32). The specific issue of whether the emission control device standard standing alone could preempt the City's lead regulations was considered and rejected by the District Court in its initial decision herein. Exxon Corporation v. City of New York, 356 F. Supp. 660, 663 (S.D.N.Y. 1973). Relying on Allway Taxi, Inc. v. City of New York, 340 F. Supp. 1120 (S.D.N.Y. 1972), the District Court found that the City's lead regulations served the purposes of the Clean Air Act and that therefore, citing Chrysler Corp. v. Tofany, 419 F. 2d 499 (2d Cir. 1969), the preemptive effect of the federal statute must be narrowly construed. Accordingly, the Court reasoned that only a federal public health standard could preempt the City's lead regulations. This preemption argument was before, but not reached by, this Court in its prior determination herein. (Exxon Corp. v. City of New York, 480 F. 2d 460 (2d Cir. 1973).

The Clean Air Act provides that no state or political subdivision thereof may attempt to enforce a fuel additive control or prohibition

> "if the Administrator has found that no control or prohibition . . . is necessary and has published his finding in the Federal Register"

or

> "if the Administrator has prescribed . . . a control or prohibition applicable to such fuel or fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the Administrator." 42 U.S.C. §1857f-6c(c)(4)(A).

It is undisputed that the federal Administrator has not published a finding that no control of lead is necessary until January 1, 1978, the date on which the federal public health controls become applicable. Appellants' argument that the promulgation of prospectively applicable controls causes preemption to occur (Appellants' Joint Brief at p. 34) is flawed because it equates the promulgation of a regulation with the prescription of a control. Certainly, the federal Administrator has prescribed regulations setting a health standard for the lead content of gasoline. But the mere promulgation of regulations does not cause preemption, for a regulation is not a control or prohibition, but rather a mechanism by which to institute a control or prohibition. To say that a regulation relating to

lead content has become effective is not tantamount to saying that a control of lead content is applicable.* Yet it is only the existence of an applicable control that triggers preemption. Consequently, the Clean Air Act in 42 U.S.C. §1857f-c(c)(1) empowers the Administrator to, "by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive."

This is not a mere semantic nicety. Plainly, the regulations prescribed by the Administrator apply to the lead content of gasoline, in that they announce the nature and date of application of prospective controls on such content. But these controls are not now applicable, and will not be applicable under the regulations presently in effect until January 1, 1978. Any doubt as to the validity of this self-evident contention may be resolved by answering the question: "What federal controls now exist concerning the lead content of gasoline?" Keeping in mind that a "control" is a "restraint" of some kind (Webster's New International

*As the District Court correctly pointed out, while the federal lead regulations include an "effective date", the word "effective" in that context is an administrative term of art related to publication requirements (135a).

Dictionary, 2nd ed. 1947), the clear answer is: "None."*

The Getty plaintiffs' argument that the mere prescription of any federal control affecting the composition of the fuel gasoline preempts all local regulation of gasoline is likewise without merit. (Supplemental Brief at pp. 3-5). The Act consistently and rigorously distinguishes fuels and fuel additives and it is clear that lead, the regulation of which is at issue here, is a fuel additive and not a fuel. Furthermore, not only is lead a fuel additive, but it is one that is unrelated to the volatility characteristics of gasoline. That is, volatility is regulated by removal of the butane-pentane (C_4 C_5) fraction which fraction is replaced by only another hydrocarbon fraction but never by

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*Appellants' argument that the requirement of the public health standard regulations that certain refinery reports be filed constitutes "present enforcement" of "current obligations" which make these regulations "applicable" (Appellants' Joint Brief at p. 35) misses the point. A report is not tantamount to a control and preemption can only be triggered by an applicable control. Indeed, to hold otherwise would be to frustrate a major purpose of the Act, namely that the nation's air be protected and enhanced in order to protect the public health and welfare. 42 U.S.C. §1857(b)(1). Under appellants' view, merely as a consequence of progress (or lack of progress) reports being filed, New York City would face a degradation of air quality because it was precluded from enforcing an otherwise valid health regulation.

lead (122a). Clearly the District Court was correct in determining that there is no basis for concluding that the federal lead regulations have preempted the City's Air Pollution Control Code to the extent that it regulates the volatility characteristics of gasoline, inasmuch as lead has no effect on volatility.

For appellants to succeed herein it would be necessary for the federal Administrator to have determined that no health controls are necessary until January 1, 1978. There is no question that the Act gives the federal Administrator the power to make such a determination, and thereby to preclude municipalities from enforcing any controls, even in the absence of applicable federal health controls. But this power is found not in subparagraph (ii) of 42 U.S.C. §1857f-6c(c)(4)(A) which is the subparagraph upon which the appellants are relying. Rather, it is found in subparagraph (i) of said section, which bars local controls "if the Administrator has found that no control or prohibition . . . is necessary and has published his finding in the Federal Register." Appellants have not argued that subdivision (i) is germane in the case at bar for the obvious reason that the Administrator has not found that public health controls on lead content are unnecessary. Rather, he has determined only that federal controls on lead content shall not be applicable until 1978.

In other words, the mere absence of federal controls until January 1, 1978, cannot support an argument that all local controls are preempted as well, because subparagraph (i) requires an express finding of no need for local controls before such preemption is effected.

Appellants claim that the federal Environmental Protection Administrator, Russell E. Train, is of the opinion that the City's lead regulations have been preempted by the promulgation of the federal health standard regulations, and argue that under the doctrine of Udall v. Tallman, 380 U.S. 1 (1965), the Administrator's interpretation should be sustained if it is reasonable, even if the Court might otherwise come to a different conclusion (Appellants' Joint Brief at pp. 36-37). The fact is, however, that the statement of the federal Administrator upon which appellants base this argument in no way even suggests that he believes that preemption already has occurred. Rather, the Administrator's letter to Senator Hart simply employs the words of the statute in noting an uncontested point, namely, that preemption occurs

once an applicable control has been prescribed.* Indeed, since the Administrator justifies preemption (when it occurs) on the ground that the federal regulations "have been designed to protect the population of precisely such areas as New York City," it is likely that he was referring to a time when such regulations become applicable, since it is certain that the City's population will not be protected during a hiatus in which no control is applied.**

In sum, then, appellants have failed to recognize the distinction that is at the heart of the instant controversy--that between an applicable control and a regulation merely announcing a prospective control. The prospective federal control is not

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*Even if the Administrator's statement could be read as expressing the view that New York City's lead regulations have been preempted, this opinion, while concededly entitled to great weight, is not controlling. Compare, e.g., the Administrator's determination that the regulation of lead under §211 of the Act at issue here is an alternative to regulating lead under §§108-110 of the Act (38 Fed. Reg. 33733, 33740-41, reproduced as Addendum B in the Joint Brief) with this Court's determination in Nat'l Resources Defense Council v. Train, No. 76-6065 Slip Op. 482-502 (2d Cir. Nov. 10, 1976) that action under §211 is supplementary to required action under §§108-110.

**Appellants also seek to attach some importance to the fact that the Corporation Counsel of the District of Columbia has rendered an opinion that local lead controls are preempted. We submit that if there is any legal significance to be drawn from that opinion, it lies in the apparent fact that it is the only such opinion to which appellants are able to point.

now applicable and so does not now protect the health of the residents of New York City. Nothing in the Act prohibits the City from affording such protection to fill the gap in the federal regulatory scheme. Cf., Monongahela Connecting R. Co. v. Pennsylvania Pub. U. Comm'n, 373 F. 2d 142 (3rd Cir. 1967). The Act does not compel local governments to accept the Administrator's decision to afford appellants an opportunity to convert gradually to to low-lead processes. Indeed, the fact that, pursuant to the stay of this Court, appellants have since 1973 marketed low lead gasoline in New York City, and the fact that pursuant to the emission control device standard a single grade of low lead gasoline is available nationally, indicates that such an opportunity is not in all instances required.

The case law provides ample basis for the acceptance of the forgeoing construction of the Act. There is no question but that the City lead regulations serve the purpose of the Clean Air Act. See Allway Taxi Inc. v. City of New York, 340 F. Supp. 1120 (S.D. N.Y., 1972), aff'd, 468 F.2d 624 (2nd Cir. 1972). And, it is established in this Circuit that the preemptive effect of a federal act must be narrowly construed where the exercise of the local police power serves the purpose of the federal act. Chrysler Corporation v. Tofany, 419 F. 2d 499 (2d Cir. 1969).

The Supreme Court has said that in order for a federal act to preempt state regulation, it must be established that "either the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakenly so ordained." Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963). By these tests, the facts at bar do not show preemption. Clearly, the control of lead in gasoline is not a subject matter which permits only one scheme of regulation. Proof of this is found not only in the fact that heretofore appellants have supplied gasoline for sale in the City of New York which conformed to the City's lead standards, but also in the Clean Air Act itself. By providing the mechanism of an Air Implementation Plan to implement standards stricter than federal controls once the federal controls are applicable (42 U.S.C. §1857f-6c(c)(4)(C), Congress has explicitly recognized that air pollution is a local problem which varies from place to place and that local conditions may require more stringent regulation. Clearly, therefore, the present facts do not show an "inevitable collision between the two schemes of regulation." Florida Lime & Avocado Growers, Inc., supra at 143.

Nor can it be shown that there was an unmistakable Congressional design to preempt the field of lead standards for gasoline prior to applicablity

of the federal control.* To the contrary, the legislative history of the Clean Air Act establishes Congress' specific concern that state and local standards remain in force until such time as the federal controls become applicable. The original Senate version of the Clean Air Act provided that the exclusive means of imposing stricter local standards was through a state implementation plan as now provided in 42 U.S.C. §1857f-6c(c) (4)(C). S. 4358, 91st Cong., 2nd Sess., §208a (1970). The Act as passed, however, in 42 U.S.C. §1857f-6c(4) (A), clearly permits state and local regulation where the federal control is not yet applicable. From this it can be seen that Congress did not intend a hiatus in regulation from the time of promulgation of the federal standard, or even the effective date of the standard, to the date such federal

*Appellants' discussion of the Congressional design to preempt the field of lead standards makes no distinction between the time prior to and during the applicability of the federal control. Similarly deficient is appellants' discussion of the preemption provisions of other statutes. Thus, for example, without conceding the relevancy of that statute to the present controversy, we note that in the provision of the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. §1392(d)) cited by appellants preemption takes place only when a safety standard is in effect. (Statute quoted in Appellants' Joint Brief, footnote at p. 22). And when Judge Robinson discussed that provision in his concurring decision in National Ass'n of Motor Bus Owners v. Brinegar, 483 F. 2d 1294, 1308 (D.C. Cir. 1973), cert. denied, 415 U.S. 948 (1974), he noted that preemption existed only "to the extent of any applicable federal standard." Id. at 1308. (Emphasis added.)

standard actually becomes applicable.

It cannot be ignored that Congress specifically provided for control of fuel additives upon a finding that the emission products of a given fuel additive will endanger the public health or welfare. Such a finding has been made with respect to lead in gasoline. See, for example, the statement at 38 Fed. Reg. 33738 reproduced in Appellants' Joint Brief at Addendum B that: "Lead additive emissions from automobiles have been determined to pose a sufficient endangerment to health to warrant regulatory action," and the statement at 33734 that: "The scheduled reduction in the use of lead additives in gasoline to achieve a significant reduction in lead emissions from motor vehicles by 1978 is based on the finding that lead particle emissions from motor vehicles present a significant risk of harm to health of urban populations, particularly to the health of city children." (Emphasis added.)

The year's lag between the effective date of the federal health regulation and the applicability of the control was intended to provide lead time for oil refiners to convert to a process for the production of nationally available low-lead gasoline. In the context of a finding of a "significant risk of harm to the health of the urban population, particularly to the health of city children," a conclusion

that provision of such lead time was intended to preempt New York City's regulation of a harmful lead additive flies in the face of the purpose of the control. Furthermore, where, as here, low-lead gasoline is already being provided, there is no necessity or justification for the one-year delay.

Indeed, such a hiatus as plaintiffs argue now exists would be contrary to the clear legislative intent of the Clean Air Act. The first of the four stated purposes of the Act is:

> "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Section 101 (b) (42 U.S.C. §1857 (b) (1).

It has been held that interpretation of the Act must be consistent with the fact that the Act "is based in important part on a policy of non-degradation of existing clean air". Sierra Club v. Ruckelshaus, 344 F.Supp. 253 (D.D.C. 1972), aff'd by an equally divided Court sub nom. Fri v. Sierra Club, 412 U.S. 451 (1973). New York City has made significant progress in improving the quality of its air during the time the City's Air Pollution Control Code has been in effect. To conclude that the City lead regulations have been preempted by either the promulgation or the "effective date" of the federal lead regulations would not only substantially set back that progress, but would create

a hiatus, a "no-man's land", with respect to the regulation of lead in gasoline. Cf. Chrysler Corporation v. Tofany, supra at 510, quoting Chrysler Corporation v. Rhodes, 416 F. 2d 324, 325 (1st Cir. 1968). Absent a clear and unmistakable Congressional intent to create such a hiatus, the City lead controls are enforceable until the federal health control becomes applicable; to wit, absent further amendment, January 1, 1978

CONCLUSION

THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED.

December 6, 1976

Respectfully submitted,

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ALEXANDER GIGANTE, JR.
EVELYN J. JUNGE

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Evelyn J Junge being duly sworn, says that on the 6th day of December 19 76 she served the annexed Brief of Appellees upon Shearman & Sterling Esq., the attorney for the Appellant (Ferran) herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 53 Wall Street in the Borough of Manhattan, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

6 day of DEC., 1976

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

Bruce S. Garner

Evelyn J Junge

Form 323-50M-721047(72) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Evelyn J Junge being duly sworn, says that on the 6th day of December 19 76 she served the annexed Brief of Appellees upon Shea Gould Climenko & Casey Esq., the attorney for the Appellants (Goetz, et al) herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 330 Madison Avenue in the Borough of Manhattan, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

6 day of Dec., 1976

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

Bruce S. Garner

Evelyn J Junge

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